

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LAMEER NATHANIEL BAKER,

Defendant-Appellant.

UNPUBLISHED
February 27, 2007

No. 266036
Oakland Circuit Court
LC No. 2005-201830-FH

Before: Owens, P.J., and Neff and White, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of assault with intent to commit murder, MCL 750.83, and possession of a firearm during the commission of a felony, MCL 750.227b. Defendant was sentenced as an habitual offender, second offense, MCL 769.10, to 262 to 600 months' imprisonment for assault with intent to commit murder and a consecutive sentence of two years' imprisonment for felony-firearm. Defendant now appeals as of right. We affirm.

In the early morning hours of February 21, 2005, Delano Rustin was walking nearing the intersection of Mitchelldale and Cloverdale in Royal Oak Township. He was approached from behind by two young men who called out to him. The two men asked Rustin, an occasional drug user, why he did not buy drugs from them. When Rustin replied that their drugs were not good, one of the young men shot him. He was shot a total of seven times and was left with severe, life-threatening injuries. Rustin identified defendant, whom he knew, as the shooter.

On appeal, defendant first argues that he received the ineffective assistance of counsel because his trial counsel failed to challenge the admission of tracking dog evidence at trial. The determination whether a defendant has been deprived of the effective assistance of counsel presents a mixed question of fact and constitutional law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). Questions of fact are reviewed for clear error, and questions of law are reviewed de novo. *Id.* Because defendant failed to move for a posttrial *Ginther*¹ hearing, our review is limited to errors apparent on the record. *People v Pratt*, 254 Mich App 425, 430; 656 NW2d 866 (2002).

¹ *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

To establish ineffective assistance of counsel, a defendant must show that counsel's performance was deficient under an objective standard of reasonableness, and that counsel's performance so prejudiced him that he was deprived of a fair trial, a trial whose result is reliable. *LeBlanc, supra* at 578; *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). Effective assistance of counsel is presumed and defendant bears a heavy burden of proving otherwise. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999).

As a condition precedent to admissibility, the reliability of tracking dog evidence must be established by showing “(1) the handler was qualified to use the dog; (2) the dog was trained and accurate in tracking humans; (3) the dog was placed on the trail where circumstances indicate the alleged guilty party to have been; and (4) the trail had not become so stale or contaminated as to be beyond the dog's competency to follow it.” *People v Harper*, 43 Mich App 500, 508; 204 NW2d 263 (1972). Defendant argues that there was no evidence to establish the third or fourth factors in the instant case. We disagree.

The evidence presented at trial showed that the tracking dog was placed on the trail where long-striding footprints in the snow indicated someone had run away from the scene. Therefore, the dog was placed on the trail where circumstances indicated the alleged guilty party had been. Further, there were no civilian onlookers at the scene, and the footprints of emergency personnel were limited to an area directly surrounding the shooting scene. The tracking dog's point of introduction to the track was made approximately two houses away. Moreover, although one deputy followed the long-striding footprints for two to three hundred feet before the tracking dog arrived on the scene, the dog was “deep in the harness”² on the track and continued tracking the long-striding footprints for several hundred feet beyond the point at which the deputy had turned back. Therefore, there was no indication that the trail had become so stale or contaminated that it was beyond the dog's competency to follow it. A proper foundation was laid for the tracking dog evidence, and it was properly admissible. Consequently, defense counsel's failure to object to its admission does not constitute ineffective assistance of counsel. See *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000) (an attorney is not ineffective for failing to object to admissible evidence). Moreover, there was abundant evidence of defendant's guilt without regard to the tracking evidence, and the court instructed the jury that the value of the evidence was limited.

Defendant next argues on appeal that he was denied a fair and impartial trial due to prosecutorial misconduct. He claims that the prosecutor's closing arguments contained improper appeals to the jury's sympathy and emotions. We disagree.

Defense counsel failed to object to the prosecutor's remarks at trial. Therefore, we review this issue for plain error requiring reversal. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). Error requiring reversal will not be found if the prejudicial effect of the prosecutor's comments could have been cured by a timely instruction. *People v Williams*, 265 Mich App 68, 71; 692 NW2d 722 (2005), *aff'd* 475 Mich 101 (2006). Our review indicates that the arguments were based on evidence presented and reasonable inferences. They were not

² A phrase meaning that the dog was “indicating on” or “committing to” a track.

improper appeals to juror sympathy or emotions. Moreover, a curative instruction could have cured any prejudice resulting from the comments. There was no plain error requiring reversal.

Finally, defendant argues in the alternative, that defense counsel was ineffective for failing to object to the prosecutor's remarks in his closing arguments. However, having found no error with regard to the alleged prosecutorial misconduct, we find no basis for a claim of ineffective assistance. *Snider, supra*. Further, in light of the overwhelming evidence of defendant's guilt, defendant has not shown prejudice, i.e., that the result of the trial was unreliable. *LeBlanc, supra* at 578.

Affirmed.

/s/ Donald S. Owens
/s/ Janet T. Neff
/s/ Helene N. White